Supreme Court, U. S.
FILED

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-481

NATHAN PENDLETON, *et al.*,

Appellants,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE COUNTY OF ORANGE STATE OF CALIFORNIA.

JURISDICTIONAL STATEMENT

BURTON MARKS, a member of the law offices of BURTON MARKS, A PROFESSIONAL CORPORATION, and STEPHEN GILBERT, ESQ.
8383 Wilshire Boulevard, Suite 510
Beverly Hills, California 90211
Telephone - (213) 655-5011

Attorneys for Appellants

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648 - (714) 536-7161

TOPICAL INDEX

	Page
Appellants appeal from the judgment of the Appellate Department of the Superior Court of the State of California, for the County of Orange	2
Opinions Below	2
Jurisdiction	2
Statement of the Case	4
The Questions Are Substantial	5
Introduction	5
The Equal Protection Issues	5
The First Amendment Issue	11
Conclusion	13
Index to Appendixes	
Appendix A - Appendix C	

TABLE OF AUTHORITIES CITED

Cases	Page
Aday vs. Superior Court, 55 Cal. 2d 789 (1961) ..	12
Argersinger vs. Hamlin, 407 U.S. 25 (1972)	10
Barrows vs. Municipal Court, 1 Cal. 3d 821 (1970)	12
Burton vs. Municipal Court, 68 Cal. 2d 684 (1968)	12
California vs. Krivda, 409 U.S. 33 (1972)	11
Chicago Police Department vs. Mosley, 408 U.S. 92 (1972)	3, 7
Douglas vs. California, 372 U.S. 353 (1963)	7
Dunn vs. Blumstein, 405 U.S. 330 (1972)	6, 8
Flack vs. Municipal Court, 66 Cal. 2d 981 (1967)	12
Griffin vs. Illinois, 351 U.S. 12 (1956)	7, 10
Groppi vs. Wisconsin, 400 U.S. 505 (1971)	10
In re Giannini, 69 Cal. 2d 563 (1968)	12
In re Panchot, 70 Cal. 2d 105 (1968)	12
Levy vs. Louisianna, 391 U.S. 68 (1968)	6
Mayer vs. Chicago, 404 U.S. 189 (1971)	3, 7, 10
Mental Hygiene Dept. vs. Kirchner, 380 U.S. 194 (1965)	11
Miller vs. California, 413 U.S. 15 (1973)	3, 5, 11

TABLE OF AUTHORITIES CITED

Cases	Page
Morrissey vs. Brewer, 408 U.S. 471 (1972)	10
NAACP vs. Burron, 371 U.S. 415 (1963)	8
Perrine vs. Municipal Court, 5 Cal. 3d 656 (1971)	12
Phelps Dodge Corp. vs. N.L.R.B., 313 U.S. 177 (1941)	11
People vs. Luris, 4 Cal. 3d 84 (1971)	12
People vs. Noroff, 67 Cal. 2d 791 (1967)	12
Rinaldi vs. Yeager, 384 U.S. 305 (1966)	8, 11
F. S. Royster Guano Co. vs. Virginia, 253 U.S. 412 (1920)	10
San Antonio School District vs. Rodriguez, 411 U.S. 1 (1973)	6, 7
SEC vs. Chenery Corp., 318 U.S. 80 (1943)	10
Shapiro vs. Thompson, 394 U.S. 618 (1969)	8
Shelton vs. Tucker, 364 U.S. 479 (1960)	8
Skinner vs. Oklahoma, 315 U.S. 535 (1942)	6
Talley vs. California, 362 U.S. 60 (1960)	3
United States vs. El Paso Natural Gas Company, 376 U.S. 651 (1964)	9, 10
Yick Wo vs. Hopkins, 118 U.S. 356 (1886)	8
Zeitlin vs. Arnebergh, 59 Cal. 2d 901 (1963)	12

TABLE OF AUTHORITIES CITED

Statutes (United States)

United States Constitution
First Amendment 4, 5, 7, 11
Fourteenth Amendment 4, 6, 8

28 U.S.C. § 1257(2) 3

Statutes (California)

California Constitution
Article VI, Section 14 ..... 4, 8, 9, 10, 11, 13

Penal Code
Section 17 9
Section 311.2 ..... 2, 3, 4, 5, 6, 7, 8 12, 13
Section 311.6 12
Section 314 12

Text

K. Davis, ADMINISTRATIVE LAW TREATISE,
§ 16.00 et seq. at 559 (Supp. 1970) 10

Comment, The Right To Non-discriminatory
Enforcement of State Penal Laws,
61 COLUM. L. REV., 1103 (1961) 8

Developments in the Law-Equal Protection,
82 HARV. L. REV., 1065 (1969) 6, 10

Gunther, A Model for a New Equal Protection,
86 HARV. L. REV., 1 (1972) 8

Gunther, Forward, Supreme Court 1971 Term,
86 HARV. L. REV., 1, 9 (1972) 10

Henkin, Selective Incorporation in the
Fourteenth Amend., 73 YALE L. J., 74 (1963) 6

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. .....

NATHAN PENDLETON, *et al.*,

Appellants,

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THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee,

ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE COUNTY OF ORANGE, STATE OF CALIFORNIA.

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Appellate Department of the Superior Court of the State of California, for the County of Orange, entered on March 12, 1975,[1] denying their Petition for Rehearing, etc., after that court's affirmance on March 4, 1975, of their judgments of conviction for distributing obscene matter in violation of California Penal Code Section 311.2.

This case presents substantial federal constitutional questions and is within the appellate jurisdiction of the Supreme Court of the United States.

OPINIONS BELOW

Neither the Municipal Court, where appellants were tried, nor the Appellate Department of the Superior Court, which affirmed appellants' judgments of conviction, published any opinions regarding this case. A copy of the order of the Appellate Department of the Superior Court filed March 4, 1975, affirming the judgments of conviction entered in the Municipal Court, is attached hereto as Appendix A. A copy of the Minute Order of the Appellate Department of the Superior Court entered March 12, 1975, denying Petition for Rehearing, etc., is attached hereto as Appendix B.

JURISDICTION

Appellants were prosecuted for misdemeanor violations

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[1]This Statement is not timely. An application for permission to file after the expiration of the allotted time, along with supporting affidavits, is being filed herewith.

of California Penal Code Section 311.2, which prohibits the distribution of obscenity. The judgment of the Appellate Department of the Superior Court of the State of California, for the County of Orange, denying appellants' Petition for Rehearing, etc., was entered on March 12, 1975, and a Notice of Appeal was filed in the Municipal Court of the Central Orange County Judicial District on April 22, 1975. The jurisdiction of the Supreme Court to review this decision[2] by appeal is conferred by Title 28, U S.C., Section 1257(2). Cases which sustain the jurisdiction of the Supreme Court to review this judgment on appeal are:

Chicago Police Department vs. Mosley, 408 U.S. 92 (1972);
Mayer vs. Chicago, 404 U.S. 189 (1971); and
Miller vs. California, 413 U.S. 15 (1973).

QUESTIONS PRESENTED

1. May a penal statute which prohibits the distribution of obscenity contain an exception which provides that the statute "shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed," without denying to other similarly situated persons, such as appellant bookstore clerks, the equal protection of the law?

2. Is a state constitutional provision requiring written appellate opinions after appeals to the state's courts of appeal

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[2]The Appellate Department is the highest court in which decision can be had. *Talley vs. California*, 362 U.S.60, 62 (1960).

and Supreme Court but not after appeals to the Appellate Department of that state's Superior Court consistent with the equal protection clause of the Fourteenth Amendment?

3. Does California Penal Code Section 311.2—the California obscenity statute, which does not, on its face, set forth specific acts which cannot be portrayed and has not been authoritatively construed to do so—violate the First and Fourteenth Amendments of the United States Constitution?

STATUTES INVOLVED

California Penal Code Section 311.2 and California Constitution Article VI, Section 14, are set forth as Appendix C hereof.

STATEMENT OF THE CASE

Appellants were charged, in the Municipal Court of the Central Orange County Judicial District, with violations of California Penal Code Section 311.2. Prior to trial, appellants filed a Demurrer and Motion to Dismiss the Complaint against them on the ground, *inter alia,* that California Penal Code Section 311.2 is unconstitutional in that it violates the First and Fourteenth Amendments of the United States Constitution. Appellants' demurrer was overruled and the motion to dismiss was denied.

The issues raised by appellants prior to trial were urged as grounds for reversal in the Appellate Department of the Superior Court in appellants' brief before that court. Appellants' judgments of conviction were affirmed without

opinion by the Appellate Department, which thereby rejected appellants' contentions regarding the constitutionality of Penal Code Section 311.2.

After the decision of the Appellate Department, appellants petitioned for rehearing, urging, *inter alia*, that they were denied equal protection of the law by the failure of the Appellate Department to give an opinion in their case. This contention was rejected by the Appellate Department, which summarily denied appellants' Petition for Rehearing.

THE QUESTIONS ARE SUBSTANTIAL

Introduction

The issues involved in this appeal fall into two general areas: (1) Failure of the State of California, in its Penal Code and Constitution, to afford similarly situated classes of persons equal protection and procedures; and (2) Its failure to meet the requirements of the First Amendment, as set forth in *Miller vs. California*, 413 U.S. 15 (1973), that obscenity statutes, as written or construed, specifically set forth the act or conduct which may not be depicted.

The Equal Protection Issues

Appellants' first contention regarding the denial of equal protection deals with California Penal Code Section 311.2. That section makes it unlawful for any person to deal in obscene materials, bring those materials into the state for sale or distribution, to possess, prepare, publish

or print those materials with intent to distribute them or exhibit them to others; to offer to distribute, distribute, or exhibit those materials to others. Section 311.2(b), however, makes an exception to the general rule of Section 311.2:

> "The provisions of this section . . . shall not apply to a motion picture operator or projectionist . . . . " (Appendix pp. 3 and 4.)

Whenever a legislative classification, such as the one in Section 311.2(b), affects fundamental interests, that classification must withstand strict judicial scrutiny to be upheld against a challenge to its validity based upon the equal protection clause. See generally, *Developments in the Law–Equal Protection,* 82 HARV. L. REV., 1065 (1969). (Hereinafter cited *Developments.*) Thus, where a legislative enactment seeks to treat two classes of persons differently, and that treatment affects a fundamental right, the normal presumption of the validity of statutes does not pertain, and the statute in question must be viewed in a critical manner by the courts, to determine whether it should stand or fall. *Dunn vs. Blumstein,* 405 U.S. 330 (1972); *Levy vs. Louisianna,* 391 U.S. 68 (1968); *Skinner vs. Oklahoma,* 315 U.S. 535 (1942).

While this Court has never cataloged the fundamental interests which give rise to the "strict scrutiny" test, the breadth of those rights is at least as great as that of the fundamental rights guaranteed by the due process clause, see Henkin, *Selective Incorporation in the Fourteenth Amendment,* 73 YALE L. J., 74 (1963); *Developments, supra,* 82 HARV. L. REV. at 1130, and includes the rights guaranteed by the Bill of Rights. *San Antonio School District vs. Rodri-*

guez, 411 U.S. 1, 33 (1973).

There are two reasons why strict scrutiny of Section 311.2 is required: Because it affects the right to freedom of expression, *Chicago Police Department vs. Mosley*, 408 U.S. 92 (1972), and because it is a penal statute which affects the liberty, protected by the due process clause, *San Antonio School District vs. Rodriguez, supra*, 411 U.S. at 61 n. 8 (Stewart, J., concurring).

In *Mosley*, the Court made clear what has often been assumed: That where an ordinance is one "affecting First Amendment freedoms," it is subject to strict judicial scrutiny. *Chicago Police Department vs. Mosley, supra*, 408 U.S. at 101. Penal Code Section 311.2, of course, affects First Amendment freedoms, and the exception to its operation set forth in subsection (b) must therefore be carefully scrutinized.

The second reason that strict scrutiny is called for is that Section 311.2 is a penal statute affecting the liberty of persons alleged to have violated it. Every person charged with a crime has the right to be treated in the same way as any other person charged with that crime. *Mayer vs. Chicago*, 404 U.S. 189 (1971); *Douglas vs. California*, 372 U.S. 353 (1963); *Griffin vs. Illinois*, 351 U.S. 12 (1956). And any exception to the operation of a penal law must withstand strict scrutiny. The exception provided by Penal Code Section 311.2(b) cannot.

It is clear that there are other persons equally entitled to an exemption from the application of Penal Code Section 311.2 as are projectionists. For example, a clerk in a bookstore with no financial interest in that store is no more culpable than the projectionist in a movie theatre. Nor,

appellants would submit, is the usher in that theatre or the person taking tickets. There is no basis at all,[3] and surely none that can withstand strict judicial scrutiny, for the distinction made in Section 311.2(b).

Where, as here, the strict scrutiny standard applies, the state must demonstrate that the law in question is "*necessary* to promote a *compelling* governmental interest." *Dunn vs. Blumstein, supra,* 405 U.S. at 342; *Shapiro vs. Thompson,* 394 U.S. 618, 634 (1969). Statutes affecting fundamental rights must be drawn with "precision," *NAACP vs. Button,* 371 U.S. 415, 438 (1963) and must use the least drastic means possible to achieve their goal. *Shelton vs. Tucker,* 364 U.S. 479, 488 (1960).

It is clear that the decision of the California Legislature to exempt projectionists from the operation of Section 311.2 cannot be supported. The statute is therefore unconstitutional in that it violates the equal protection clause of the Fourteenth Amendment to the Constitution. *Cf.* comment, *The Right To Non-discriminatory Enforcement of State Penal Laws,* 61 COLUM. L. REV., 1103 (1961); *Yick Wo vs. Hopkins,* 118 U.S. 356 (1886).

Appellant's second contention regarding the denial of "equal protection" involves Article VI, Section 14, of the California Constitution. Article VI, Section 14 requires that certain appellate courts provide written

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[3]Even if the "strict scrutiny" test were not called for, the lesser "rational basis test" could not be met, for there is no substantial relationship between the exception provided for in Section 311.2(b) and an actual legislative purpose. *Rinaldi vs. Yeager,* 384 U.S. 305 (1966); Gunther, *A Model For A New Equal Protection,* 86 HARV. L. REV., 1 (1972).

opinions, while other appellate courts need not:

> "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." (Appendix p. 3.)

Essentially, Article VI, Section 14 requires written opinions on appeals from felony convictions[4] but not from misdemeanor convictions, without regard to the sentence imposed. A person convicted of a felony but not sentenced to serve time in custody is entitled to a written opinion, as is a person convicted in the Superior Court and given a misdemeanor sentence, while a person convicted of one or more misdemeanors in the Municipal Court is not entitled to a written opinion by the reviewing court (the Appellate Department of the Superior Court), even if he is sentenced to serve one or more[5] years in custody.

It is appellants' contention that the failure of Article VI, Section 14 to require written opinions by the Appellate Department of the Superior Court denies them equal protection of the law, for it prevents meaningful appellate review of Appellate Department judgments, see, *United States vs. El Paso Natural Gas Company,* 376 U.S.

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[4]Both the Supreme Court and Courts of Appeal also hear appeals from misdemeanor convictions, both those which arise in the Superior Court (misdemeanors by sentence – California Penal Code Section 17) and those which begin in the Municipal Court and are later transferred to the Court of Appeal for decision by the Appellate Department of the Superior Court.

[5]While a misdemeanor cannot be punished by a period of incarceration in the county jail for more than one year (California Penal Code Section 17), where there is more than one count, a Municipal Court judge may sentence a defendant to serve more than one year in jail by sentencing him to serve consecutive sentences.

651, 656-57 (1964); *SEC vs. Chenery Corp.*, 318 U.S. 80, 94 (1943); K. Davis, ADMINISTRATIVE LAW TREATISE, § 16.00 *et seq.* at 559 (Supp. 1970), without regard to whether the appellant involved was sentenced to serve time in custody or not. *Cf. Argersinger vs. Hamlin*, 407 U.S. 25, 37 (1972).

Appellants feel that since criminal appeals involve a fundamental interest, Gunther, *Forward, Supreme Court 1971 Term*, 86 HARV. L. REV., 1, 9 (1972); see *Griffin vs. Illinois*, 351 U.S. 12 (1956), the "strict scrutiny" test must be applied to Article VI, Section 14. Thus, there must be procedures which allow no invidious discrimination between persons who should be treated equally. *Griffin vs. Illinois, supra*, 351 U.S. at 17. The distinction here cannot survive strict scrutiny, for the only state interest involved is a fiscal one, one which cannot tip the balance enough to support a determination that Article VI, Section 14 is valid. *Mayer vs. Chicago, supra*, 404 U.S. at 197. The right to an opinion is too important a right to allow for its elimination in cases, such as this one, where appellants face incarceration should their appeal fail. See *Morrissey vs. Brewer*, 408 U.S. 471, 489 (1972).

Assuming, however, that the strict scrutiny test does not apply, the difference in treatment allowed by Article VI, Section 14 cannot even meet the lesser "rational basis" standard, *F. S. Royster Guano Co. vs. Virginia*, 253 U.S. 412 (1920); *Developments, supra*, 82 HARV. L. REV. at 1077, for the distinction between felonies and misdemeanors is an "unreasoned" distinction. *Mayer vs. Chicago, supra*, 404 U.S. at 196; see *Groppi vs. Wisconsin*, 400 U.S. 505 (1971). Avenues of appellate review must be kept free of

such unreasoned distinctions, for they can only impede free access to the courts.[6] *Rinaldi vs. Yeager*, 384 U.S. 305, 310 (1966). The distinction allowed by Article VI, Section 14, between persons tried in the Municipal Court and those tried in the Superior Court, cannot survive judicial inquiry: it violates appellants' right to equal protection.

The First Amendment Issue:

In *Miller vs. California*, 413 U.S. 15, 24-27 (1973), this Court set forth specific guidelines limiting the scope of obscenity regulation:

> "[W]e now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value."

Regulation, according to *Miller*, must be limited to:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; and

(b) Patently offensive representations or

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[6] In addition, it should be pointed out that opinions void needless litigation. *Phelps Dodge Corp. vs. N.L.R.B.*, 313 U.S. 177, 197 (1941); see *California vs. Krivda*, 409 U.S. 33, 35 (1972); *Mental Hygiene Dept. vs. Kirchner*, 380 U.S. 194, 196-97 (1965).

depictions of masturbation, excretory functions and lewd exhibitions of the genitals.

When viewed in light of *Miller*, it is clear that California Penal Code Section 311.2, on its face, does not meet the requirements set forth by this Court with regard to specific description of prohibited activity. Obviously, the kind of specific description required is not included in the statute itself, which is merely worded in the general phrasing of the *Roth* test. Thus, unless the statute has been authoritatively construed to apply to specific sexual acts, Penal Code Section 311.2 is unconstitutional. Appellants submit that Penal Code Section 311.2 has not been authoritatively construed by the California courts.

There are only three decisions of the California Supreme Court dealing with the construction of Penal Code Section 311.2.[7] They are *Zeitlin vs. Arnebergh*, 59 Cal. 2d 901 (1963); *People vs. Noroff*, 67 Cal. 2d 791 (1967); and *In re Panchot*, 70 Cal. 2d 105 (1968). None of these cases purports to define the kind of sexual activity which must be depicted in order to violate the statute. None of them does anything more than to decide whether the material before the court was obscene as defined by Penal Code Section 311.2. There was no attempt to set forth examples of conduct which *is* obscene. There was no construction of Penal Code Section 311.2.

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[7]The Supreme Court's other obscenity cases clearly do not construe Section 311.2. *Aday vs. Superior Court*, 55 Cal. 2d 789 (1961) [invalid search warrant]; *Flack vs. Municipal Court*, 66 Cal. 2d 981 (1967) [warrantless seizure]; *Burton vs. Municipal Court*, 68 Cal. 2d 684 (1968) [motion picture licensing ordinance]; *In re Giannini*, 69 Cal. 2d 563 (1968) [Penal Code Section 314]; *Barrows vs. Municipal Court*, 1 Cal. 3d 821 (1970) [theatres with live performances not included within Penal Code Section 311.6]; *People vs. Luris*, 4 Cal. 3d 84 (1971) [probable cause]; *Perrine vs. Municipal Court*, 5 Cal. 3d 656 (1971) [bookstore ordinance].

CONCLUSION

It is submitted that both California Penal Code Section 311.2 and California Constitution Article VI, Section 14 are unconstitutional for the reasons stated above. Appellants feel that the questions presented by this jurisdictional statement are substantial, that they are of public importance, and that they merit a full review, with briefs by both sides, before this Court.

Respectfully submitted

BURTON MARKS

STEPHEN GILBERT

Attorneys for Appellants

INDEX TO APPENDIXES

		Page
A	Order of Superior Court of the State of California, County of Orange, Appellate Department, affirming judgments of conviction for violation of Penal Code Section 311.2	1
B	Minute Order of Superior Court of the State of California, County of Orange, Appellate Department, denying Petition for Rehearing and Certification to Court of Appeal	2
C	Statutes	3
	Article VI § 14 California Constitution	3
	§ 311.2 California Penal Code	3
	§ 311. California Penal Code	4

In the Appellate Department, Superior Court of the State of California, County of Orange.

NO. APS-1697 - 1714.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. NATHAN PENDLETON, VALENTINO RODRIQUEZ, MYRON CURDY, ETC., ET AL., Defendants and Appellants.

FILED MARCH 4, 1975

On Appeal from the Municipal Court of the Central Orange County Judicial District, Hon. Philip E. Schwab, Judge.

This cause having been argued and submitted, and fully considered, judgment is ordered as follows:

It is ORDERED AND ADJUDGED that the judgments of conviction for violation of Penal Code Section 311.2 made and entered in the Municipal Court of the above designated Judicial District, County of Orange, State of California, in the above entitled cause be and the same is hereby affirmed, and the cause is remanded to the Municipal Court for further proceedings.

Dated this 4th day of March, 1975.

W. CHARAMZA, Judge

KNEELAND, Judge

JUDGE, Presiding Judge

MINUTE ORDER OF MARCH 12, 1975

In the Appellate Department of the Superior Court of the State of California, in and for the County of Orange.

Court convened at 10:00 A.M., March 12, 1975, present Hon. KNEELAND, J.; Hon. CHARAMZA, J.; Hon. JAMES F. JUDGE, Presiding Judge; H J. Gallagher, Deputy Clerk; . . . . , Deputy Sheriff; . . . . , Reporter, and the following proceedings were had:

AP-1697, 1698, 1699, 1700, 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1708, 1709, 1710, 1711, 1712, 1713, 1714.

PEOPLE vs. PENDLETON, ET AL.

Petition for Rehearing/Certification to Court of Appeal and Application and Order for Stay of Mandate Pending Appeal/Certiorari having been timely filed and the Court having considered the Petitions and review the record; does now rule, the Petitions and each of them are hereby denied.

ENT. 3-12-75

STATUTES

CALIFORNIA CONSTITUTION:

Article VI

§ 14. Publication of opinions; decisions of Supreme Court and courts of appeal.

Sec. 14. The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person.

Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.

CALIFORNIA PENAL CODE:

§ 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state.

(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

(b) The provisions of this section with respect to

the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

§ 311. Definitions.

As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter

is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter or live conduct.

(f) "Exhibit" means to show.

* * *

STATE OF CALIFORNIA)
)
County of Orange) ss.

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on SEPTEMBER , 1975, I served the within JURISDICTIONAL STATEMENT (PENDLETON, et al. vs. PEOPLE OF THE STATE OF CALIFORNIA) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

Appellate Department
Orange County Superior Court
700 Civic Center Drive West
Santa Ana, California 92701
(1 copy)

District Attorney
County of Orange
700 Civic Center Drive West
Santa Ana, California 92701
(2 copies)

Attorney General
State of California
5006 State Building
1350 Front Street
San Diego, Ca. 92101
(1 copy)

Municipal Court of the
Central Orange County Judicial Dist.
700 Civic Center Drive West
Santa Ana, California 92701
(1 copy)
For: Hon. Philip E. Schwab, Judge

I declare under peanlty of perjury that the foregoing is true and correct.

Executed on SEPTEMBER , 1975, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer, 326½ Main Street, Huntington Beach, Ca.
(714) 536-7161

Supreme Court, U. S.
FILED
OCT 24 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-4811

NATHAN PENDLETON, *et al.*,

Appellants,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE APPELLATE DEPARTMENT
OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

MOTION TO DISMISS OR AFFIRM

CECIL HICKS, District Attorney, County of Orange, State of California
MICHAEL R. CAPIZZI, Assistant District Attorney
BY: ORETTA D. SEARS
Deputy District Attorney
Head, Writs and Appeals Section
700 Civic Center Drive West
Santa Ana, California 92701
Telephone - (714) 834-3600

Attorneys for Appellee

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648 - (714) 536-7161

TOPICAL INDEX

Motion to Dismiss or Affirm **Page**

Appellee moves for dismissal of appeal or affirmation of the judgment below 1

Statement of the Case 2

Questions Presented 3

1. May a penal statute which prohibits the distribution of obscenity contain an exception which provides that the statute "shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed," without denying to other similarly situated persons, such as appellant bookstore clerks, the equal protection of the law?

2. Is a state constitutional provision requiring written appellate opinions after appeals to the state's courts of appeal and Supreme Court but not after appeals to the Appellate Department of that state's Superior Court consistent with the equal protection clause of the Fourteenth Amendment?

3. Does California Penal Code Section 311.2—the California obscenity statute, which does not, on its face, set forth specific acts which cannot be portrayed and has not been authoritatively construed to do so—violate the First and Fourteenth Amendments of the United States Constitution?

Argument 4

TOPICAL INDEX

Argument (cont'd)		Page
I.	Failure to file a notice of appeal within the prescribed period requires dismissal of the appeal	4
II.	The request for extension of time within which to docket the appeal was not timely	4
III.	Appellants' contention that the exemption from prosecution of motion picture projectionists in California Penal Code Section 311.2(b) denies them equal protection of the laws is frivolous	6
IV.	The question of whether the provisions of Rule 106 of the California Rules of Court, and the California Constitution Article VI, § 14, are constitutionally deficient in requiring written opinions upon appeals decided by the state courts of appeal but not in matters decided by Appellate Departments of the California Superior Courts is not justiciable in the case at hand ..	10
V.	The constitutionality of the California Penal Code Section 311.2 and its compliance with the mandates of *Miller v. California*, 413 U.S. 15, does not present a substantial federal question	11
Conclusion		12

TABLE OF AUTHORITIES CITED

Cases	Page
Hicks v. Miranda, ... U.S. ..... , 45 L. Ed. 2d 223	11
Madden, Executor v. Kentucky, 309 U.S. 82, 60 S. Ct. 406, 84 L. Ed. 2d 590, 125 A.L.R. 1383	8, 9
Miller v. California, 413 U.S. 15	11
Miller v. California, ... U.S. ..... , 94 S. Ct. 3206	11
People v. Stout, 18 Cal. App. 3d 172	6, 7
People v. Western Fruit Growers, 22 Cal. 2d 494	7, 8
Rast v. Van Deman, 240 U.S. 342, 36 S. Ct. 370, 60 L. Ed. 679	8
Richfield Oil Corporation v. Franchise Tax Board, 169 Cal. App. 2d 331, 337 P.2d 237	8, 9
State v. J-R Distributors, Inc., 512 P.2d 1049	9
California Constitution	
Article VI, § 14	10
California Statutes	
Penal Code § 311 et seq.	2, 3, 6, 11

TABLE OF AUTHORITIES CITED

United States Supreme Court Rules — **Page**

Rule 11(2) 4
Rule 13(1) 4, 5
Rule 16 1
Rule 22(1) 5
Rule 22(4) 5
Rule 34(2) 5

California Rules of Court

Rule 106 10

Text

Stern and Gressman,
Supreme Court Practice, p. 331 4

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. .....

NATHAN PENDLETON, *et al.*,

Appellants,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE APPELLATE DEPARTMENT
OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein or in the alternative to affirm the judgment of the Appellate Department of the Superior Court of the State of California, County of Orange, on the ground

that it is manifest that the questions presented by the appeal are so insubstantial as not to warrant further argument, and on the further ground that the judgment was properly affirmed by the state court.

STATEMENT OF THE CASE

Appellants, in eighteen separate complaints, were charged with over 100 violations of California Penal Code Sections 311.2 and 311.5 allegedly committed between December 8, 1972 and May 30, 1973. All of the charges were consolidated and appellants, after a jury trial, were found guilty of all of the charges. Consequently, on April 15, 1974, each appellant was sentenced as follows: six months suspended in the Orange County Jail, informal probation for three years, thirty days in the Orange County Jail as a condition of probation, and a $500 fine plus penalty assessments or the serving of 25 days in the Orange County Jail in lieu thereof.

Appellants' convictions were affirmed by the Appellate Department of the Superior Court on March 4, 1975. On March 10, 1975, appellants filed a document entitled an *Application and Order for Stay of Mandate Pending Appeal or Certiorari* and an additional document entitled *Petition for Rehearing/Certification to Court of Appeals, Fourth Appellate District, Division Two.*

On March 12, 1975, the Appellate Department of the Superior Court denied the Petition for Rehearing and Certification *and* the Application for Stay Pending Appeal. On that same date remittitur issued, and the order of the Appellate Department of the Superior Court of Orange County

affirming the judgment was entered on that date.

The records of the Appellate Department of the Superior Court do not reflect the filing of a notice of appeals to this Honorable Court, and the People did not receive a notice of appeals. The only document filed or received by the People of the State of California or by the Appellate Department of the Superior Court is the Jurisdictional Statement filed with this Honorable Court on September 24, 1975.

QUESTIONS PRESENTED

Appellants state the questions presented for resolution by this Court to be as follows:

1. May a penal statute which prohibits the distribution of obscenity contain an exception which provides that the statute "shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed," without denying to other similarly situated persons, such as appellant bookstore clerks, the equal protection of the law?

2. Is a state constitutional provision requiring written appellate opinions after appeals to the state's courts of appeal and Supreme Court but not after appeals to the Appellate Department of that state's Superior Court consistent with the equal protection clause of the Fourteenth Amendment?

3. Does California Penal Code Section 311.2–the California obscenity statute, which does not, on its face, set forth specific acts which cannot be portrayed and has not been authoritatively construed to do so–violate the First and Fourteenth

Amendments of the United States Constitution?

ARGUMENT

I

Failure To File A Notice Of Appeal Within The Prescribed Period Requires Dismissal Of The Appeal.

Rule 11(2) of the United States Supreme Court Rules prescribes a 90-day time limitation with respect to an appeal from "the judgment of a state court of last resort in a criminal case." As pointed out by Stern and Gressman's *Supreme Court Practice* at page 331:

> "The foregoing time limits for filing notices of appeal may not be extended under any circumstances or for any reason. Since the notice is a simple document to prepare, even simpler than a motion to extend the time would be, this is not an onerous prohibition. Failure to file the notice of appeal within the time prescribed by § 2101 or Rule 11 may result in the dismissal of the appeal by the Supreme Court. *Territo v. United States,* 358 U.S. 279; *Taggart v. New York,* 392 U.S. 667."

II

The Request For Extension Of Time Within Which To Docket The Appeal Was Not Timely.

Although Rule 13(1) allows a Supreme Court Justice the power to extend the time for docketing an appeal, the request

for extension of time must be filed in compliance with Rule 34(2) and the extension should not be beyond the 60 days specified by Rule 13(1). As to all types of appeals, Rule 13(1) provides that for good cause shown a Justice of the Supreme Court "may extend the time for docketing a case for a period not exceeding sixty days." This provision significantly changed the prior open-ended practice whereby docketing extensions could be granted for lengthy and unrestricted periods of time and replaced it by the express provision of Rule 13(1) that such extensions shall not exceed 60 days—a limitation that Rule 22(1) has long imposed on extensions of time for filing petitions for certiorari.

Rule 13(1) specifies that applications for extensions of time in which to docket appeals must specify good cause shown, and that such applications "are not favored"—an admonition repeated in Rule 22(4) as to applications for additional time in which to file petitions for certiorari. The timeliness of these applications is governed by Rule 34(2), which provides that an application of this nature "*must be presented*" to the Clerk of the Supreme Court within the period sought to be extended and "shall be submitted at least ten days before the expiration of the period sought to be extended and will not be granted except in the most extraordinary circumstances if filed during the last ten days of such period."

In the case at hand, the application was filed September 24, 1975. The judgment became final on March 12, 1975. The 90-day period expired June 12, 1975. The additional 60-day period allowed by Rule 13 expired August 12, 1975, more than one month prior to the filing of the application.

Moreover, where as here the "good cause" is nothing more

than alleged failure of communication between attorneys, the requested extension should be denied because extraordinary circumstances have not been set forth.

III

Appellants' Contention That The Exemption From Prosecution Of Motion Picture Projectionists In California Penal Code Section 311.2(b) Denies Them Equal Protection Of The Laws Is Frivolous.

California Penal Code Section 311.2(b) excludes from prosecutions,

> " . . . a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed."

The California courts have construed the exemption to apply solely and exclusively to projectionists. Thus, in *People v. Stout*, 18 Cal. App. 3d 172, for example, the court stated:

> "We disagree with appellant's interpretation of the statute. 'Motion picture operator' is stated in the alternative to 'projectionist' and is clearly in close association with the latter term. In terms of applicable canons of statutory construction, . . . 'under the rule of *noscitur a sociis* the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used.' (*Vilardo v. County of Sacramento*, 54 Cal. App. 2d 413, 420 [129 P.2d 165].) The legislative

> history of this subparagraph, adduced by appellant, fortifies our conclusion that 'motion picture operator' is to be understood in terms of the associated word 'projectionist,' just as in *Vilardo, supra,* 'agent' was to be interpreted in terms of the associated words 'attorney' and 'counsel.' (*Id.* at p. 420.) Thus, in 1968, the relevant term read 'motion picture machine operator' and there was no reference to 'projectionist'; the section was amended in its present form in 1969 and the Legislature made no attempt to broaden the exemption created in the statute beyond the 'motion picture operator' but, on the contrary, further refined the definition of the exempted class by adding, in the alternative, 'projectionist,' a term not susceptible to misinterpretation."

The basic starting point in considering an equal protection argument is that the statute is presumed valid. The burden then is on the defendants to prove that it is unreasonable. As the Court stated in *People v. Western Fruit Growers,* 22 Cal. 2d 494, 506-507:

> "Problems of classification under the California Constitution are thus similar to those presented by the federal equal protection of the laws clause of the 14th Amendment. Under either provision, the mere production of inequality which necessarily results to some degree in every selection of persons for regulation does not place the classification within the constitutional prohibition. The discrimination or inequality produced, in order to conflict with the constitutional provisions, must be

> 'actually and palpably unreasonable and arbitrary,' or the legislative determination as to what is a sufficient distinction to warrant the classification will not be overthrown. [Citations.] When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification. [Citations.]"

Numerous California and federal cases are in accord with the above proposition. For example, as the Court said in *Rast v. Van Deman*, 240 U.S. 342 at 357, 36 S. Ct. 370, 60 L. Ed. 679 at 687:

> "It is established that a distinction in legislation is not arbitrary, *if any state of facts reasonably can be conceived that would sustain it, and that the existence of that state of facts at the time the law was enacted must be assumed* . . . It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety." (Emphasis added.)

Richfield Oil Corporation v. Franchise Tax Board, 169 Cal. App. 2d 331 at 336, 337 P.2d 237, quotes as follows from *Madden, Executor v. Kentucky*, 309 U.S. 82 at 88, 60 S. Ct. 406, 84 L. Ed. 2d 590 at 593, 125 A.L.R. 1383 at 1386:

> " . . . The burden is on the one attacking the legislative arrangement to negative every

conceivable basis which might support it."

A classification exempting from prosecution motion picture projectionists is both reasonable and constitutional, for, as stated in *State v. J-R Distributors, Inc.*, 512 P.2d 1049, 1061:

> "There are valid reasons for the classification. The following are by no means exclusive: (1) Book and magazine stores offer a wide range of materials from which both the customer and clerk may select at the time of sale. Each has an opportunity to choose that which will be sold or purchased. On the other hand, motion pictures are shown one reel at a time and the projectionist must exhibit those selected by the manager. (2) Projectionists do not decide which films to exhibit and thus should not be obliged to make a judgment as to their obscenity. Furthermore, to require a projectionist to decide whether the showing of a particular film would be a crime might tend to 'chill' the dissemination of borderline, but constitutionally protected motion pictures."

IV

The Question Of Whether The Provisions Of Rule 106 Of The California Rules Of Court, And The California Constitution Article VI, § 14, Are Constitutionally Deficient In Requiring Written Opinions Upon Appeals Decided By The State Courts Of Appeal But Not In Matters Decided By Appellate Departments Of The California Superior Courts Is Not Justiciable In The Case At Hand.

Article VI, § 14, of the California Constitution, as pertinent herein, provides as follows:

> "Decisions of the Supreme Court and courts of appeal *that determine causes* shall be in writing with reasons stated." (Emphasis added.)

By contrast, Rule 106 of the California Rules of Court, which applies to Appellate Departments of California Superior Courts, states that:

> "The judges of the appellate department shall not be required to write opinions in any cases decided by them, but may do so whenever they deem it advisable or in the public interest."

Appellants argue that the failure of the California Constitution to mandate the Appellate Department of the Superior Court to file a written opinion constitutes an invidious discrimination giving rise to a defect of constitutional magnitude. Without reaching (or in any way conceding) the "merits" of appellants' argument, appellee submits that the argument fails because appellants in the case at hand failed to present this issue to the Appellate Department of the Superior Court, even though they did file a Petition for Rehearing. Having failed

to raise the issue in the state court in a timely fashion, appellants are precluded from raising the issue in the present case.

V

The Constitutionality Of The California Penal Code Section 311.2 And Its Compliance With The Mandates Of *Miller v. California,* 413 U.S. 15, Does Not Present A Substantial Federal Question.

Appellants argue that the California statute does not meet the requirements set forth by *Miller v. California* and is therefore unconstitutional. The same identical issue and, in fact, the same identical claim were made by the same attorney in *Miller v. California,* ..... U.S. ..... , 94 S. Ct. 3206. This Honorable Court dismissed that appeal "for want of a substantial federal question." As pointed out by this Honorable Court in *Hicks v. Miranda,* ..... U.S. ..... , 45 L. Ed. 2d 223, 236, that decision was a decision on the merits and refutes the validity of appellants' present claim:

> "That case was an appeal from a decision by a state court upholding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our appellate jurisdiction under § 1257(2), and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We were not obligated to grant the case plenary consideration, and we

did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one."

CONCLUSION

For all of the above reasons, appellee respectfully submits that the case presents no substantial federal question for determination by this Honorable Court. Additionally, the decision of the state court is so obviously correct that the ends of justice will best be served by this Court's dismissal of the appeal or by this Court's affirmance of the state court's decision on the merits.

Respectfully submitted,

CECIL HICKS, District Attorney,
County of Orange, State of California

MICHAEL R. CAPIZZI
Assistant District Attorney

BY: ORETTA D. SEARS
Deputy District Attorney
Head, Writs and Appeals Section

Attorneys for Appellee.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on OCTOBER 22 1975, I served the within MOTION TO DISMISS OR AFFIRM (Pendleton, et al. vs. People of the State of California) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

Appellate Department
Orange County Superior Court
700 Civic Center Drive West
Santa Ana, California 92701
(1 copy)

Attorney General
State of California
5006 State Building
1350 Front Street
San Diego, California 92101
(1 copy)

Burton Marks
Attorney at Law
8383 Wilshire Blvd., Suite 510
Beverly Hills, California 90211
(3 copies)

Municipal Court of the
Central Orange County Judicial Dist.
700 Civic Center Drive West
Santa Ana, California 92701
For: Hon. Philip E. Schwab,
Judge
(1 copy)

I declare under penalty of perjury that the foregoing is true and correct

Executed on OCTOBER 22nd, 1975, at HUNTINGTON BEACH, CALIFORNIA

D. A. Standefer

Dean-Standefer, 326½ Main St , Huntington Beach, Ca. 92648
(714) 536-7161